

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 November 2023

**Public Authority:** The British Broadcasting Corporation ('the BBC')

**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7TS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to tweets posted by Gary Lineker. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

#### **Request and response**

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3. On 11 April 2023 the complainant requested:
  - "1. During the aforementioned period did the Director-General and or the Director of Sport write to and or communicate with Mr Lineker about any of his tweets and or his postings on social media. I am interested in all correspondence and communication with either mentions and or in which in any way relates to Mr Lineker's tweets or postings on social media. Many of these tweets and postings will have nothing to do with BBC programming. If the answer is yes, can you, please provide copies of this correspondence and communication.
  2. During the aforementioned period did Mr Lineker write to and or communicate with the Director General and or the Director of port about any of his tweets and or his postings on social media. I'm

interested in all correspondence and communication which either mentions and or in which in any way relates to Mr Lineker's tweets or postings on social media. Many of these tweets and postings will have nothing to do with BBC programming. If the answer is yes, can you, please provide copies of this correspondence and communication.

3. During the aforementioned period did the Director-General and or the Director of Sport meet with Mr Lineker specifically to discuss his tweets and other postings on social media. Many of these tweets and postings will have nothing to do with BBC programmes. In the case of each meeting can you provide a date, time and venue. In the case of each meeting can you please provide a full list of those present. In the case of each meeting can you identify the tweets and social media posts under discussion. In the case of each meeting can you please provide copies of any relevant minutes."
4. On 21 July 2023 the BBC responded to the request. It explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'. It explained:  
  
"In the case of your request, Gary Lineker's tweets or postings on social media relate to impartiality, which is an editorial issue even where the postings are not directly about BBC programmes. This information forms part of the ongoing review of the guidance of impartiality, with a view to further enhancing these editorial standards. Internal correspondence and discussion relating to this matter plays a significant role in helping to inform editorial discussion and decisions going forward."
5. The complainant has argued:  
  
"I do not believe the derogation should apply in this instance not least because in my original request for information I asked the BBC to redact "all references to BBC programmes and brands from the information provided."

## **Reasons for decision**

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6. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states:  
  
"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."

7. This means that the BBC has no obligation to comply with part I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
8. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.
9. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

" .... once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that "...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)
10. The Supreme Court endorsed this approach in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4<sup>1</sup> and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
11. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.
12. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature – it is not subject to FOIA.
13. The Supreme Court said that the Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

August 2006)) as comprising three elements, continues to be authoritative

"1. The first is the collecting or gathering, writing and verifying of materials for publication.

2. The second is editorial. This involves the exercise of judgement on issues such as:

- \* the selection, prioritisation and timing of matters for broadcast or publication,
- \* the analysis of, and review of individual programmes,
- \* the provision of context and background to such programmes.

3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

14. However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'.
15. The Supreme Court also explained that "journalism" primarily means the BBC's "output on news and current affairs", including sport, and that "journalism, art or literature" covers the whole of the BBC's output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.
16. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.
17. The information that has been requested in this case is information about tweets Gary Lineker posted and this information informs the ongoing review into the BBC's impartiality policy. This is still the case whether the BBC redacts the names of any programmes or brands as per the complainant's suggestion.
18. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.

19. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
- The purpose(s) for which the information was held at the time of the request;
  - The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.
20. In previous decision notices<sup>2</sup>, the Commissioner decided that the BBC's impartiality policy, which is designed to avoid complaints of bias, falls under the definition of journalism as outlined in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)).
21. Specifically, information that informs the impartiality policy would fall under the third element of the definition of 'journalism' as outlined in paragraph 13. The impartiality policy is designed to uphold journalistic standards and integrity and the policy will be used to guide, train, inform and regulate individual journalists. The overall aim of this policy is to retain the high standard and quality of the work the BBC produces.
22. In this case the requested information falls within the derogation. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism, specifically the maintenance and enhancement of the standards and quality of journalism.
23. For all of the reasons above, the Commissioner is satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617165/fs50895113.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021230/ic-126672-d3h0.pdf>

## Right of appeal

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24. Either party has the right to appeal against this decision notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-Tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

25. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

## Signed

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**